No. 14645

# United States Court of Appeals
## For the Ninth Circuit

FRED I. PUTMAN and JAMES A. OVERMAN, *Appellants,*

vs.

HARRY C. LOWER, JOHN KADLEC, GEORGE S. HERNING, EDGAR L. PEECHER, WILLIAM E. BARQUIST and NORMAN L. BUNKER, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANTS

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*Proctors for Appellants.*
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## BRIEF OF APPELLANTS

### STATEMENT OF JURISDICTION

The appellants were the owners of the oil screw Silver Spray and sold the vessel to Robert J. Tobin for the sum of $35,000.00 on a down payment of $5,000.00, taking a first preferred marine mortgage to secure the balance (Libs. Putnam and Overman, Exs. 4 and 5). Under written agreements Tobin sold fishing shares to appellees Harry C. Lower, George S. Herning, Edgar L. Peecher, William E. Barquist and Norman L. Bunker. Before the Silver Spray commenced the fishing voyage it was attached by the United States Marshal on a libel in rem filed by Lower (Tr. 3). The libel purports to be "in a cause of wages and damages, civil and martime" and seeks a recovery of $5,000.00

against the vessel in rem as the sum Lower might have earned had the fishing venture been fulfilled. The appellees Herning, Peecher, Barquist and Bunker filed intervening libels of the same substance (Tr. 12, 20, 27) and for like recoveries but did not apply for formal seizure through monition and attachment.

Thereafter the appellants intervened by their libel in rem and in personam (Tr. 33) to foreclose their first preferred marine mortgage and proceeded with the formalities of an original monition and attachment (Tr. 41).

The District Court issue was whether the appellees had liens for future fishing shares, or any liens at all, superior to appellants' preferred mortgage.

The said appellees did not cite Tobin for in personam recoveries but only for deficiencies after sale.

The appellants contend that the pleadings of the said appellees, together with uncontradicted evidence and testimony, clearly demonstrate that in fact said appellees brought the proceedings as a means to recover their original investments on the grounds that Tobin extracted monies through fraud and deceit. Accordingly, the actions were not of admiralty cognizance and should have been brought as common law proceedings. Therefore the appellants take the position that the District Court did not have jurisdictional authority to enter Findings of Fact and Conclusions of Law (Tr. 63) and the Decree (Tr. 77) granting said appellees maritime liens for speculative earnings on fish that were never caught, all to the prejudice of appellants' mortgage.

Jurisdiction is only one issue on appeal. As developed in our Statement of the Case and our Argument we challenge the merits on two points, namely: said appellees were not entitled to maritime liens for speculative fishing shares where the vessel never left the dock and consequently fish were never caught; and, there was an utter failure to prove speculative damages.

**Jurisdiction of the District Court**

It is contended the District Court did not have admiralty jurisdiction to entertain appellee Lower's libel in rem or the libels of Herning, Peecher, Barquist and Bunker as in fact and law they were common law actions to recover money had and received through deceit, and as such jurisdiction was solely vested in the common law side of the appropriate court. Under the provisions of Title 28, U.S.C.A., Sec. 1333, the District Court did have jurisdiction to foreclose appellants' first preferred marine mortgage as alleged in their Intervening Libel in Rem and in Personam (Tr. 33).

**Jurisdiction of the Court of Appeals**

The jurisdiction of this court is granted by the provisions of Title 28, U.S.C.A., Sec. 1291, which gives to the Courts of Appeal, jurisdiction of all appeals from final decrees of District Courts.

## STATEMENT OF THE CASE

Throughout the trial the said appellees stressed their claims that Tobin intended to defraud them in the original negotiation of the written fishing share agreements beginning with the Lower contract of April 17, 1954, through to the Bunker contract of June 2, 1954 (Res. Exs. A-1, and A-5 to A-8 incl.). They further

contend that Tobin abandoned the Silver Spray on June 7, 1954. The District Court found (Findings of Fact XV, Tr. 67; Oral Decision, Tr. 281) that Tobin did so abandon the venture giving rise to liens for future fishing shares.

The appellants will make some reference to the facts to support their basic argument that the said appellees actually claimed fraud and deceit as a basis for the recovery of their investments and therefore the District Court sitting in Admiralty lacked jurisdiction. Insofar as the priority of the mortgage is affected, the appellants are not concerned with Tobin's intentions at the times the contracts were executed, or why or under what circumstances the said appellees left the vessel. The applicable law will demonstrate that in rem liens cannot exist for future speculative fishing shares where the voyage was never undertaken, and particularly where the libelants themselves caused the vessel's seizure. For what the observation may be worth, appellants do feel that the finding of wrongful discharge by Tobin cannot be justified by the record. Had there been a wrongful discharge, said appellees might have had personal recourse against Tobin but not against the Silver Spray to the prejudice of the mortgage. Appellants do believe that the record lends credence to said appellees' position that in the original negotiation of each share contract, Tobin exaggerated the earning potential of the Silver Spray. In properly instituted actions at common law, juries would be required to determine whether said appellees were thoroughly informed and accepted the consequences, or whether they were induced through fraud to part with their funds.

At this time it may be appropriate to explain the position of appellee Kadlec. On April 14, 1954, he signed a working share contract with Tobin on the Sockeye (Res. Ex. A-10) but by an intervening libel (Tr. 12) claimed he was a member of the crew of the Silver Spray. He maintained in his libel, as did the others, that Tobin discharged him and accordingly he was entitled to recover against the Silver Spray the sum of $5,000.00 as his share of the 1954 tuna catch, if the vessel had gone fishing. Later Kadlec, through his proctor Robert Wells, withdrew from the case (Tr. 31) and refused to plead further. At the trial, however, he appeared through Bogle, Bogle & Gates, and for the first time orally claimed a lien of $500.00 for wages due while working on the Silver Spray. Thus throughout this brief Kadlec will be referred to individually as distinguished from the remaining appellees who signed Silver Spray fishing contracts and who will be collectively referred to as "libelants" or "appellees."

The validity of appellants' preferred mortgage has no relationship to the representations or the misrepresentations made by Tobin at the varying times the contracts were entered into. However, it would seem that the trial court was persuaded to hear the case in admiralty in order to test the legitimacy of Tobin's defalcations as alleged and testified to by the appellees. Principally the appelles complain:

1. They were induced to buy shares to tuna fish off San Diego, California, and make anywhere from $5,000.00 to $7,000.00 a year.
2. In San Diego the vessel would be outfitted with bait tanks and refrigeration.

3. Tobin claimed the vessel was a tuna clipper when it was not.
4. Tobin claimed he had a contract with Van Camp's in California.
5. Tobin said they would hire a helicopter to find tuna.
6. Tobin told Lower and Herning that he owned the boat but did not at that time.

These, among other statements, were strongly emphasized by appellees at the trial as being misrepresentations. Tobin answered that he knew nothing about tuna fishing and said so but hoped the fishing party would accomplish its purpose; had a purchase agreement for the boat from appellants which was not consummated until April 28, 1954, the date of the note and mortgage; was told by a third party that the Silver Spray was a tuna clipper and that tuna clippers made that kind of money; and, further, that the shareholders were fully informed of these factors and understood the risks involved.

To reveal the background leading to these proceedings, and to enlighten the court as to the general nature of the controversy between appellees and Tobin, and to support our jurisdictional argument, we proceed with the highlights of one of the strangest of all maritime adventures.

Pursuant to newspaper ads (Lib. Ex. 3) the appellees communicated with Tobin and after preliminary discussions signed the share contracts as noted. All paid $2,500.00 except Bunker, who paid $1,500.00 and gave a promissory note for $1,000.00 for the balance. Each of the contracts in part provides that if the shareholder becomes dissatisfied he shall give Tobin thirty days

notice to enable Tobin to replace the share without hindering operations, and if the shareholder leaves or is dismissed he shall give Tobin ninety days to make a full refund. Each contract also provided that Tobin had the right to direct the vessel's movements.

On May 18, 1954, the Silver Spray left for Alaska on a shake down cruise and on board were the appellees, Tobin, Kadlec, Doss R. Payne, one James T. Gehrig and three hired members who were the cook, the engineer and the captain Don Moore. Payne was an intervening libelant along with Kadlec and Bunker (Tr. 12) but Payne refused to press the litigation or appear at the trial. One other man named Trowbridge went along for the excursion but his identity plays no part in the litigation. After the Silver Spray reached Alaska, and within several days of May 21, 1954, Tobin returned to Seattle by air to investigate a fruitless Silver Spray enterprise that should have developed during the Alaska trip (Tr. 236, 237). Gehrig and Peecher returned with him, the later claiming he could not stay aboard due to his health. Peecher wanted a quiet settlement and Tobin agreed to refund Peecher's money as fast as possible (Tr. 173, 238).

Appellants leave this meager review of the transcript momentarily to remind the court that as evidenced by the testimony, the appellees' case was founded upon the proposition that the happenings during the Alaskan voyage were part and parcel of Tobin's design to exact funds through false representations.

Reverting to the record we find that when Peecher arrived in Seattle he continued on to his home in Port-

land, Oregon. On May 28, 1954, Tobin wrote Peecher that he was leaving for the south very soon and wanted to know if Peecher was willing to go along or have his money back. Peecher replied on May 29 that he would be under a doctor's care and would like his money as soon as Tobin could pay (Res. Ex. A-9). While in Seattle Tobin claims he checked with various sources as to the means of obtaining equipment to tuna fish (Tr. 240). This episode, as are all others, is doubted by appellees. On May 28, Tobin wired Moore and Lower in Alaska as follows:

> "Get ready to leave immediately for Seattle. Bring poles so can outfit for southern tuna. Call me Edmond Meany Hotel, Seattle, immediately." (Res. Ex. A-2)

On June 2, Tobin and Bunker signed the working share agreement to leave for tuna fishing shortly (Tr. 205-206). By ship-to-shore Tobin learned that the vessel hit a log in Puget Sound and needed repairs. Moore and Lower met Tobin at the hotel at 5:30 A.M., June 3, and Tobin instructed Moore to let the men off to go home during drydocking. Tobin made drydocking arrangements and in the evening told Lower he was going to Spokane because his daughter was sick. Tobin did so and remained there until June 7. According to Tobin he removed his gear from the vessel so that Bunker could have the captain's quarters, but in any event Tobin expected to precede the vessel to the south (Tr. 262). On June 4, Lower removed all his gear (Tr. 108), never returned to the Silver Spray, and on June 5 sought legal guidance through the Seattle law firm of Bogle, Bogle and Gates.

There has been no satisfactory explanation for the occurrences between Tobin's departure on the evening of June 3 until his return to Seattle on June 7. Peecher announced his decision to withdraw by his letter of May 29. Lower left on June 4. Gehrig, who was on board June 4, testified that a number of people were mad at each other. Barquist then wanted to retire and recoup his investment (Tr. 270). Gehrig testified Tobin wanted to go tuna fishing, though Gehrig wanted to freight in Alaska (Tr. 269). On the 4th Gehrig wanted to remove Tobin from the vessel and form a corporation (Tr. 171). The libels allege Tobin abandoned the vessel and appellees did not know his whereabouts, though several tried to reach him at his own Spokane address. Gehrig contacted him and said there was trouble, whereupon Tobin sought a Spokane lawyer. On June 7 Tobin returned to the vessel and found Peecher so pugnacious that he threatened to jail Tobin unless he got his money back (Tr. 242) and wanted to punch him in the nose (Tr. 177). Tobin said settle with my lawyer and arranged to see Mr. Swontoski that evening. While at the lawyer's Barquist wanted nothing more than his money back, and was willing to abide by the contract and give Tobin the agreed ninety days (Tr. 270). Throughout this upheaval Bunker assumed he would take the boat tuna fishing (Tr. 270).

As far as Herning is concerned, he went home for liberty on the 3rd when the vessel docked (Tr. 148). Tobin called him on the 3rd and asked if he could handle the engine room (Tr. 149). Herning knew the vessel had to be drydocked and an operational delay was unavoidable (Tr. 155).

After the fiasco of the 7th, Tobin proceeded to put the vessel in drydock (Tr. 243) but during the course of repairs it was seized through the Lower libel on June 10; nevertheless Tobin paid the drydocking bill of $356.00 (Tr. 235; Res. Ex. A-2, pocket S). Thereafter he claims he attempted to post bond, release the vessel and proceed with the operations (Tr. 243, 244).

All appellees admit that Tobin never fired them: Herning (Tr. 156); Lower (Tr. 119); Barquist (Tr. 202); Peecher (Tr. 174).

That the appellees were, or were not, in admiralty solely depends upon their interpretation of the facts under oath and the nature of the relief they were seeking. Accordingly we respectfully defer a review of their testimony on this phase until we reach our argument on the lack of admiralty jurisdiction in the District Court.

To prove damages measured by the loss of speculative fishing shares, the appellees produced Hervey Petrich. Obviously he was an unbiased witness and experienced in the tuna clipper industry. In general he frankly admitted he knew nothing about the potential earnings of a jig boat like the Silver Spray. As the proof of damages is in issue on the merits, we ask leave to detail his testimony throughout the course of our argument on that subject.

Also, at the pleasure of this court, later we prefer to examine the evidence as to Kadlec's alleged wage agreemnt with Tobin on the Silver Spray.

## SPECIFICATION OF ERRORS RELIED UPON

1. The court erred in failing to find and decree that the preferred marine mortgage of appellants Putnam and Overman is a first, prior, and superior lien against the vessel Silver Spray, or it sproceeds.

2. The court erred in finding and decreeing that libelant Lower and intervening libelants Herning, Peecher, Barquist and Bunker, or either of them, have any lien whatsoever against the vessel, or any cause of action either in personam or rem enforceable in admiralty.

3. The court erred in finding and decreeing that said libelant and said intervening libelants proved any damages, and this error is assigned regardless of whether the libels were or were not properly instituted and prosecuted within the admiralty jurisdiction of the District Court.

4. The court erred in finding that said libelant and said intervening libelants were employees rather than fishermen expecting to operate fishing lay.

5. The court erred in finding that said libelant and said intervening libelants were ready, able and willing to continue to perform their fishing contracts, and that they or either of them were wrongfully discharged.

6. The court erred in finding and decreeing that on June 7, 1954, the said libelant and said intervening libelants had valid causes of action against the vessel for damages to the extent of the claimed value of the share of each of them in and to a speculative tuna fish catch.

7. The court erred in finding that the Silver Spray was constructed and equipped as a tuna clipper for fresh bait fishing and refrigeration.

8. The court erred in finding that said libelant and

said intervening libelants had or have causes of action properly instituted in admiralty rather than common law actions for fraud and deceit or money had and received.

9. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to recover $7,500.00 each or any amount whatever.

10. The court erred in failing to make specific findings on damages as required by Admiralty Rule 46½.

11. The court erred in finding and decreeing that said libelant and said intervening libelants are entitled to maritime liens for seamen's wages.

12. The court erred in decreeing that said libelant and said intervening libelants have superior martime liens for prospective fishing shares on fish that were not caught.

13. The court erred in failing to find and decree that appellants Putnam and Overman are entitled to a decree foreclosing their preferred ship mortgage as the first and only lien against the Silver Spray, and erred in failing to condemn said vessel and to order its sale to apply the proceeds to the payment of appellants' note and preferred marine mortgage.

14. The court erred in failing to find and decree that said libelant and said intervening libelants should be charged with all costs incurred.

15. The court erred in finding and decreeing that intervening libelant John Kadlec was hired by the owner Tobin to stand watches as a seaman on the shakedown cruise to Alaska; and further erred in finding and decreeing that John Kadlec is entitled to any recovery for wages for the reason that such a finding and adjudication is against the preponderance of credible evidence.

## ARGUMENT

As declared at the outset of the Statement of the Case we have not attempted or felt obliged to offer a detailed analysis of the facts. It is clear from the testimony that as events developed, appellees Lower, Peecher and Barquist became convinced that Tobin had attempted fraud and deceit as of the time each contract was executed and the funds changed hands. It is uncontradicted that Lower, Peecher and Barquist elected to withdraw from the fishing enerprise on or before June 4, 1954, and their severance was not due to firing by Tobin. The testimony reveals many instances of misunderstanding and a complete lack of knowledge of tuna fishing by all concerned. Bunker concisely expressed the situation. When asked whether he and Tobin were groping on a new and untried venture, he answered, "I believe the trade name is we were both green beans" (Tr. 210). The chaos was not alleviated by Tobin's puffer talk. As a unit the appellees charge that Tobin's every act was engendered through a plan or scheme to defraud. However, these are not admiralty questions, but issues to be decided by a common law court. If admiralty had any jurisdiction at all, the court could do no more than render a personal judgment against Tobin for damages for wrongful discharge, if there was one, and if damages could have been proven.

Accordingly, the appellants in appealing to this court for the preservation of their marine mortgage are impartial to all the factual differences between Tobin and appellees.

We have emphasized the foregoing facts to prove that

Lower resorted to an in rem action in admiralty on June 10, 1954, as a means to recover his $2,500.00 paid to Tobin on April 17, 1954.

The libel resulted in Tobin's prevention to resell the shares of Lower, Barquist and Peecher under the contracts, and the appellant mortgagees were compelled to stand by helplessly while the Silver Spray was sold by the marshal at a sacrifice sale of $11,000.00 (Tr. 87) of which sum all parties stipulated that the marshal be reimbursed for costs to the extent of $713.65.

As the authorities will demonstrate, the ultimate truth or falsity of wrongful discharge only bears upon the personal recourse that appellees, or any of them, may have against Tobin.

Our presentation of the authorities will be made under the following categories:

A. Jurisdiction.

B. Appellees' Liens Are Invalid.

C. Damages were not Proven.

D. Kadlec had no Wage Agreement.

### A. Jurisdiction

**The District Court lacked maritime jurisdiction over Common Law Causes of Action asserted by the libelants, Lower, Barquist, Bunker, Herning, and Peecher.**

At the very outset this Court is confronted with a vital question of jurisdiction. The appellants, Putnam and Overman, insist that whatever causes of action the other libelants may have had against Tobin, the owner of the "Silver Spray," such causes of action were essentially common law causes of action for fraud and de-

ceit and hence not within the admiralty jurisdiction of the United States District Court. The claim of Lower, the original libelant, may be taken as typical. In his original libel upon which the vessel was seized by the Marshal (Tr. 1-6), Lower pleaded that on or about April 17, 1954, he was employed by Tobin as a member of the crew of the vessel on a proposed tuna fishing venture; that Tobin failed to carry out the venture as agreed and that in consequence he, the libelant, was entitled to recover $5,000.00 which would have been his proportionate share of the catch if the venture had not been abandoned by Tobin. Tobin, answering the original libel and the intervening libels of Barquist, Bunker, Herning and Peecher, pleaded a written contract under which these libelants engaged in the proposed tuna venture on a fishing lay basis (Tr. 46-52). Lower replied by denying the validity of the contract and specifically alleged that it was obtained in consequence of fraudulent representations made by Tobin with intent to deceive and hence was null and void and of no effect. That was the vital issue in the case. But however the pleadings may have been framed in the first instance, when the evidence has been taken the pleadings had served their purpose and it is the evidence that must control. The pleadings allege fraud and the uncontradicted evidence, if it proves anything, proves that the real complaint of the so-called shareholders against the owner Tobin is fundamentally a claim for fraud or deceit. The original libelant Lower testified that on April 11, 1954 he was in Hermiston, Oregon and saw an ad in the Portland Oregonian. He went to Spokane and there met Tobin, with whom he had conversations relative to a proposed tuna

fishing operation. He decided to buy a share in the operation and paid Tobin $2500.00 (Tr. 120-121). Tobin said that he was the sole owner of the boat and Lower put up $2500.00 relying upon that misrepresentation (Tr. 122).

> "Q. (By Mr. Carey) : You are trying to get damages because you claim Tobin deceived you, is that right? A .Yes (Tr. 123).
>
> * * *
>
> Q. At the time you negotiated this contract with Tobin on April 17th and you put up $2500.00, are you now claiming that Tobin told you the truth or cheated you? A. Cheated me." (Tr. 123-124)

The intervening libelants above named testified in substance to exactly the same fraudulent misrepresentations on which they relied (Herning, Tr. 158; Peecher, Tr. 178; Barquist, Tr. 203; Bunker, Tr. 212). That this evidence establishes a common law action for fraud, if it establishes anything, cannot be gainsaid. The trial judge, in delivering his oral opinion, admitted that fundamentally the claims of these libelants were founded on fraud perpetrated by Tobin. In the course of that oral opinion, the court said:

> "It is possible that such libelant and intervening libelants also had on that day a cause of action at common law against respondent Tobin for fraud and deceit or some other action at law, but on that date such libelant and intervening libelants were not required against their choice to sue upon such causes of action at law, and they did not do so.
>
> "The mere fact that on cross-examination one or more of them may have given testimony tending to evidence a cause of action at law does not in this case prevent the libelant and intervening libelants

> from disavowing any request or intention of request for any relief in this admiralty court on any such cause of action at law, and each and all of such libelant and intervening libelants have effectually disavowed any such intent through their counsel who have a right to speak for them." (Tr. 279-280)

This erroneous view is the very foundation of the Decree that the court ultimately entered (See Finding of Fact XIX, Tr. 68). The trial judge thus recognized the jurisdictional obstacle but sought to avoid it because the evidence was elicited on cross-examination, but uncertain as to the sufficiency of that ground, the trial court resorted to an even more untenable ground by holding that although the libelants' causes of action were common law actions for fraud, nevertheless they have disavowed "through their counsel who have a right to speak for them."

We believe it is a novel suggestion that undisputed and indisputable evidence can be completely discarded because and only because it has been elicited on cross-examination. What is cross-examination for if not to develop the facts in general and jurisdictional facts in particular? In the next place, we think it is an even more novel proposal to suggest that a common law action for fraud can be converted into a maritime cause of action, creating a maritime lien superior to an admittedly valid preferred ship mortgage, by the simple expedient of a disavowal by counsel. It is unnecessary to cite decisions from other circuits for the question has already been definitely decided in this circuit by several decisions holding that an admiralty court has no juris-

diction unless the real and substantial controversy is *wholly maritime.* A maritime color lurking in the background is not sufficient.

> *Home Insurance Company v. Merchants Transportation Company,* 12 F.(2d) 931 (D.C., Wash.);
>
> *Home Insurance Company v. Merchants Transportation Company,* 16 F.(2d) 372 (9th Cir.);
>
> *Westfull, et al., v. Tug Boat Company,* 73 F. (2d) 200 (9th Cir.).

These decisions from this circuit were called to the attention of the trial judge and no decisions to the contrary were cited or can be cited. If, as claimed, Tobin defrauded Lower and the intervening libelants, their actions were common law actions for fraud or deceit or possibly for money had and received. In either event, there is no jurisdiction in admiralty. Certainly there is no jurisdiction to subordinate a preferred ship mortgage, the validity of which is admitted, because the alleged fraud of the mortgagor is in no way shown to be chargeable to the mortgagees.

In thus assuming that these libelants by disavowal of counsel could effectively convert a common law action for fraud into a maritime cause of action, we believe the trial judge became confused as to the applicable statutory provisions relative to maritime jurisdiction. The jurisdiction of the United States District Court in Admiralty is limited to maritime causes of action. The original Judiciary Act of 1789 gave the United States District Courts exclusive jurisdiction over admiralty and maritime causes of action but saving to suitors "the right of a common law remedy where the common law is

competent to give it." The phraseology of that jurisdictional statute has been changed from time to time but in substance it has always remained the same. It now reads:

> "The district courts (of the United States) shall have original jurisdiction, exclusive of the courts of the States of:
>
> "(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." (United States Code Annotated, Title 28, Section 1333, page 575)

A party having a maritime cause of action may, at his election, sue in a common law court but the converse is not true. A party having only a common law cause of action cannot sue in admiralty. The admittedly valid preferred ship mortgage must be given priority without regard to the claims of Lower, et al., that they were defrauded by Tobin.

The intervening libel of Kadlec is on a somewhat different footing. He claims wages as a seaman for services performed on the trip from Seattle to Ketchikan and return, but as will be shown in another place, his evidence wholly failed to show that he was engaged as a seaman by Tobin.

### B. Appellees' Liens Are Invalid

**Fishermen do not have liens against a vessel for fish that were never caught, and particularly for speculative earnings that might accrue after seizure.**

Regardless of the cause of severance of a fisherman from his vessel, and whether right or wrong, and regardless of his right to recover personally against the

owner or master, he cannot seize a vessel and impose a maritime lien *in rem* for a share on fish that were never caught, sold or accounted for. Under no circumstances may a fisherman lien a vessel for any earnings that might have been made from and after the date of seizure by a marshal, and this is particularly true where the libelant fisherman himself causes the attachment.

Generally, a vessel may not be libeled for speculative shares, but only against the vessel for shares of the catch that has been made, brought safely to port and ascertained and liquidated. The same principle applies to any type of vessel with a crew working on a profit-sharing basis:

> *Reed v. Hussey,* Fed. Cas. No. 11,646 (D.C. N.Y.);
>
> *Williams v. The Sylph,* Fed. Cas. No. 17,740 (S.D.N.Y.).

When a vessel does not engage in the voyage, it cannot be libeled for future earnings, and this is particularly true in those instances where the seizure is caused by the crew:

> *Sigurjonsson v. Trans-American Traders,* 188 F.(2d) 760 (5th Cir.);
>
> *Vlavianos v. The Cypress,* 171 F.(2d) 435 (4th Cir.).

Though a seaman is hired to safeguard the vessel after seizure and during the lay-up period even then he cannot libel the vessel but must pursue the person who hired him:

> *Bromfield Mfg. Co. v. The Brown, Smith & Jones, et al.,* 117 F.Supp. 630 (D.C. Mass.).

The leading case on the lien issue and upon which appellants greatly rely, is *Old Point Fish Co., Inc., v. Haywood, et al.,* 109 F.2d 703 (4th Cir.) In anticipation that the Court will study the opinion, we will not extend this brief by relating the complete facts and legal conclusions. However, the following excerpt may be pertinent at this time as it reflects the thinking of all authorities in point:

> "In accordance with the general rule that maritime liens do not arise from matters happening subsequent to the legal seizure of the ship, it has uniformly been held (in the absence of an applicable statute or duly authorized continuing services of seamen) that no maritime lien can be allowed for wages to seamen accruing after the libeling of the ship. * * * (Cases cited) * * * In Benedict on Admiralty, 5th Ed., 585, the rule is stated that 'seizure of a vessel under process, resulting in breaking up the voyage, operates as a discharge of the crew who, therefore, have no lien for further wages.'
>
> * * * * * * * *
>
> "In the instant case it is clear that the crew earned nothing from the catch up to the time of the seizure of the ship, and they performed no services thereafter, but apparently recognized the breaking up of the enterprise by the filing of their libel claims. See *The Nissequogue, supra; The Charles L. Baylis* (D.C.) 25 Fed. 862. Whether, if the fishing enterprise had not been broken up, they would subsequently have earned compensation for their share of the catch and if so the amount thereof, was wholly speculative, uncertain, and dependent upon future happenings. If they had been employed for a definite period at a definite wage they would not

> have been entitled to a prior lien for the wages accruing after the seizure of the ship, even though the amount were certain. A *fortiori* they were not entitled to a prior lien for compensation which might have been earned from a future catch wholly speculative in amount." (P. 705)

The trial judge announced that the *Haywood* case was contrary to his own inclinations (Tr. 288, 289) and invited counsel to produce conflicting authorities. None were forthcoming, nor can there be. Thus through independent research the trial court located *Carborne v. Ursich,* 209 F.2d 178 (9th Cir.), and by applying it felt that Tobin had committed a maritime tort (Tr. 288). We utterly fail to see any resemblance of that case to the one at bar. There the offending vessel ran into and damaged a net and the fishermen on the other vessel recovered damages equal to the four days required to repair the net. However, their right to damages was not in issue. The entire opinion by the court was directed to whether the fishermen had a cause of action in their own names or whether it had to be brought by the owner of the net.

Neither does this case come within sound decisions which hold that a wrongfully discharged seaman may, at the end of the season, impose a lien against a vessel for his share of the profits on fish that have been caught.

Appellants do not condone Tobin's handling of the Silver Spray fiasco, but neither do we believe that appellees used ordinary sound business prudence in engaging in the venture. Appellees and Tobin knew from the beginning that none of them had ever tuna fished before. Tobin made no attempt to abscond with the

investments and offered to account for every penny at the trial. Our point now is that under our authorities and the share contracts, he could have dismissed all appellees, and had he done so they would not have a lien for future shares. And regardless of whether they were or were not wrongfully discharged, there can be no recoveries against the vessel for future speculative shares from June 10, 1954, when Lower libeled the vessel.

### C. Damages Have Not Been Proven

**Appellees' proof of damages related to vessels used as tuna clippers. By the admission of their own expert witness, such testimony had no bearing on the probable profits of a jig rigged boat like the Silver Spray.**

We have the deepest respect for appellees' witness Hervey Petrich, who admittedly has vast experience with the bait boat clipper industry. On direct-examination Petrich proceeded to describe the large catches of a tuna clipper, though in reviewing his testimony we fail to find an exact figure for the 1954 season. In any event the probable catch for a large bait boat has no relationship to a jig boat like the Silver Spray. This witness testified that there is a difference between a bait boat and a jig boat and the latter is never referred to as a clipper. He explained that a jig boat is actually a small trolling vessel and usually carries about three men (Tr. 190). Upon being handed a photograph of the Silver Spray he at once declared that the vessel was not a bait boat and his testimony had no relationship to jig fishing (Tr. 188-189). Previously he testified that he had never seen the Silver Spray and did not know her capacity or suitability for catching tuna. We believe the trial

judge erred in finding (Tr. 280, Findings of Fact XVII, Tr. 68) that the Silver Spray was a tuna clipper when Petrich said it was not.

Bait tanks and refrigeration installed in the Silver Spray could not have changed the hull construction or her carrying capacity. Tobin's representations as to these factors could not convert the comparatively small catches of a jig troller into the huge tonnage of a clipper. If Tobin's calling the Silver Spray a "clipper" meant anything, it meant that appellees might only use such a representation as a further element of fraud in a common law action.

Petrich frankly admitted that he could offer no figures as to any catch for the Silver Spray. He was not aware that neither Tobin or the appellees had never tuna fished before. It is inconceivable that he would imply under oath that these parties would fare as well, or fare at all, as fishermen with many years' experience. Regardless of whether the Silver Spray is a clipper or a jig or a seiner, these appellees cannot use Petrich's extensive fishing experience as their own, for unlike Petrich they have never tuna fished before.

This truism is established by the decisions of the State of Washington wherein the contracts were executed:

In *Webster v. Beau,* 77 Wash. 444, 137 Pac. 1013, the plaintiff and defendant entered into a partnership venture to establish a new fur trading business in Alaska but the defendant refused to comply with the contract. Among other causes the plaintiff sued for loss of future

profits. With reference to speculative damages, the court observed:

> "It did not pertain to any existing business. Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed or conducted. *There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits.* * * * It is common knowledge that parties expecting profitable results frequently enter upon business enterprise which terminate in failure." (P. 449, Emphasis supplied)

> "The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business."

Quoting from a Kansas decision:

> " * * * it must be made to appear that the business was an one—that is, that it had been successfully conducted for a length of time and had such a trade established that the profits thereof are reasonable and ascertainable."

In accord are:

> *Lockit Cap Company v. Globe Mfg. Co.,* 158 Wash. 183, 290 Pac. 813;
>
> *Carolene Sales Co. v. Canyon Milk Products Co.,* 122 Wash. 220, 210 Pac. 366;
>
> *Catarau v. Sunde & d'Evers Co.,* 188 Wash. 592, 63 P.2d 365.

In furtherance of our objections to damages, and as to whether they were properly assessed, we do not believe that Rule 46½ of the Rules of Practice in Admir-

alty and Maritime Cases was complied with. This rule requires that specific findings must be made. No one can be sure as to the District Court's method in arriving at a gross recovery for each appellee in the sum of $7500.00. They only asked for $5000.00. At best we may only speculate as to the source of the remaining $2500.00. Our best guess is that the trial court was refunding appellees' investments on the share contracts. He could not have done so on the theory of enforcement of the contracts for it is admitted that appellees, or some of them, refused to perform by giving the required thirty days' notice, thereby permitting Tobin to have ninety days to re-sell shares. Thus the only other foundation for awarding $2500.00 to each appellee must have been because at the moment the District Court was sitting as a court of common law and chose to refund these amounts on the common law principles of fraud and deceit.

Our suppositions may be completely out of order, but when rule 46½ is not complied with there is nothing left but conjecture and speculation as to the probabilities.

### D. Kadlec Had no Wage Agreement

**Kadlec's wage agreement is contrary to the preponderance of credible evidence.**

Kadlec's wage claim is unworthy of belief. The excerpts appearing below from his testimony should be sufficient to deny him relief. There were at least nine other men on board for the Alaska trip. Of them, Lower had been in the navy during the war. Moore and Gehrig were licensed in the coastal trade. Herning and Tobin

had been on small boats in Alaska. Helwig was a licensed engineer. At the most, a captain and any two of these men would normally handle the lines on a 77-foot vessel. It is preposterous to assume that Tobin would hire Kadlec as a deckhand under such circumstances, particularly on April 14, 1954, when he did not even own the Silver Spray. Kadlec contradicted himself by saying he had been hired on a wage basis when he had previously testified that he could go along with the Silver Spray if he bought into it. His memory is faulty on a number of things but particularly when he claims part of his duties was standing a regular watch. He could not remember which watch. If he stood a regular watch he would know the hours as surely as a Boeing employee would know whether or not he had been on the swing shift for the past month or so. No one knew of his salaried position. Though Tobin had funds on the way up to Alaska and when back in Seattle, Kadlec made no effort to demand the claimed weekly wage. In Seattle he left the boat for all time and never claimed wages due. Nor did he ask Swontoski. He and Swontoski only discussed $150.00 for what Kadlec claimed was due on the Sockeye. Nor did he tell his first proctor about such an arrangement. It was not until the second day of the trial that he made the claim contrary to the allegations of his original intervening libel.

The appellants contend the evidence overwhelmingly proves that Kadlec and Tobin did not have a seaman's wage agreement for the Silver Spray:

1. As of April 14th, the date of the Sockeye share agreement, Tobin did not own the Silver Spray, but was merely planning to purchase it (Tr. 139, 215).

2. Kadlec understood that he would receive $100.00 a week providing he bought a share on the Silver Spray (Tr. 134). He did not do so. It is likely Tobin meant and Kadlec understood that such earnings would be shares of the catch.

3. Kadlec had little experience handling vessels (Tr. 133).

4. Kadlec knew the captain and cook were on wages but he made no mention of the alleged wage contract to anyone (Tr. 139).

5. Kadlec's libel was filed July 26, 1954, but he did not tell his attorney, Robert C. Wells, about a wage agreement (Tr. 217).

6. When the vessel had returned, Kadlec claims he talked with Mr. Swontoski and talked about wages on the Silver Spray (Tr. 216).

7. Mr. Swontoski denies this and testified that Kadlec felt Tobin owed him $150.00 for working on the Sockeye and he would waive his investment of $500.00 if the $150.00 were paid; further, no claim was made against the Silver Spray (Tr. 222, 223).

8. On cross-examination Kadlec admitted he never discussed the Alaska trip with Tobin but found out about the Alaska voyage from other men on board. Not having discussed the trip, he could not explain how he had a wage agreement (Tr. 218).

9. Tobin emphatically denies a wage contract (Tr. 225).

Appellants submit that though he had the burden of proof, the preponderance of the evidence is against Kadlec; any doubts should be resolved in favor of the first preferred marine mortgage.

## CONCLUSION

A court of admiralty sits in equity. The appellants handed a valuable vessel to Tobin and took back a first preferred mortgage, valid in all respects. They were entirely innocent of all dealings between Tobin, appellees and Kadlec. On the other hand, appellees entered into this venture with knowledge of the risks, and they were in a position to fully acquaint themselves with their rights and remedies during the voyage to Alaska and upon their return to Seattle. Under the law of maritime liens and of speculative damages, as applied to the facts and circumstances, we are at a complete loss to understand how the District Court was able to ignore appellants' bona fides, and enter a decree which resulted in a substantial loss to and devaluation of appellants' security.

For the reasons set forth we ask that the decree of foreclosure of the mortgage be affirmed but otherwise it be set aside for complete lack of jurisdiction in the District Court. Or should not that be the pleasure of this Court, then that the decree be reversed on the merits.

Respectfully submitted,

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